83-533

Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA;
LOUISIANA SOYBEAN ASSOCIATION; AND
MISSOURI PACIFIC RAILROAD COMPANY;

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Petitioner Jerry K. Nicholson* submits the following question:

Whether the court of appeals erred in concluding that the Interstate Commerce Commission properly deregulated the construction of major railroad classification yards, notwithstanding the clear requirement of 49 U.S.C. §§ 10901(a) and 10102(19) that such railroad line extensions or additions be certificated by the agency.

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* Petitioner Jerry K. Nicholson is an individual. The caption in the case in this Court contains all parties in the proceeding before the court of appeals. Holloway Planting Co. had been an additional petitioner in the proceeding before the court of appeals, but was dismissed voluntarily as a party.

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No. ___

JERRY K. NICHOLSON,

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v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA;
LOUISIANA SOYBEAN ASSOCIATION; AND
MISSOURI PACIFIC RAILROAD COMPANY;

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Jerry K. Nicholson respectfully requests that this Court issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review and reverse a decision entered by that court on June 30, 1983, affirming an Interstate Commerce Commission decision not to regulate the Missouri Pacific Railroad Company's construction of a 550 acre, $75 million railroad classification yard.

OPINIONS BELOW

The decision by the United States Court of Appeals for the District of Columbia Circuit, reproduced as Appendix ("App.") A hereto, is reported as *Nicholson* v. *ICC*, 711

F.2d 364 (D.C. Cir. 1983). In that decision the court affirmed a February 11, 1982, decision of the Interstate Commerce Commission ("Commission") in Finance Docket No. 29657, reported as *Nicholson* v. *Missouri Pacific R.R.*, 366 I.C.C 69 (1982). That Commission decision, reproduced as App. B hereto, in turn affirmed an August 28, 1981, decision of the Commission's Review Board No. 3. The decision rendered by Review Board No. 3 is reproduced in App. C hereto.

JURISDICTION

The decision and judgment of the court of appeals were entered on June 30, 1983, and neither a petition for rehearing nor a suggestion for rehearing *en banc* were filed. Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

Three statutory provisions are involved in this case.[1]

49 U.S.C. § 10901(a) (Supp. V 1981) provides:

§ 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension of any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

---

[1] These provisions are the codification, without substantive change, of provisions of the former Interstate Commerce Act.

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

49 U.S.C. § 10102(19) (Supp. V 1981) states as follows:

§ 10102. Definitions

In this subtitle—

* * *

(19) "railroad" includes—

(A) a bridge, car float, lighter, and ferry used by or in connection with a railroad;

(B) the road used by a rail carrier and owned by it or operated under an agreement; and

(C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

49 U.S.C. § 10907(b) (Supp. V 1981) provides:

§ 10907. Exceptions

* * *

(b) The Commission does not have authority under sections 10901-10906 of this title over—

(1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks if the tracks are located, or intended to be located, entirely in one State; or

(2) a street, suburban, or interurban electric railway that is not operated as part of a general system of rail transportation.

STATEMENT OF THE CASE

This case concerns the proposed construction, by Missouri Pacific Railroad Company ("Missouri Pacific"), of a railroad classification yard covering in excess of 550 acres in Pointe Coupee Parish, Louisiana, on land mostly owned by Petitioner Jerry K. Nicholson ("Nicholson"). Nicholson's land currently is used to grow soybeans and other crops. Missouri Pacific, a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission, has a right-of-way across Nicholson's land for the operation of a single track line of railroad.

On May 22, 1981, Nicholson, along with other landowners not parties to this case, filed a complaint with the Interstate Commerce Commission, because Missouri Pacific, without having sought or obtained from the Commission a certificate of public convenience and necessity in accordance with 49 U.S.C. § 10901(a), had filed an eminent domain action in the 18th Judicial District Court for the Parish of Pointe Coupee, State of Louisiana, to condemn or expropriate all or part of Nicholson's lands for "a new modern railroad yard facility and related facilities and appurtenances." Missouri Pacific's proposed railroad yard was to be built adjacent to its track on Nicholson's land, and would enable the carrier to classify or sort and redirect the day-to-day flow of traffic only a portion of which heretofore had been handled on the single track traversing Nicholson's property. Nicholson argued that the railroad yard would be an extension of a railroad line or an additional railroad line, the construction of which could take place only pursuant to a Commission "public convenience and necessity" finding.

The Commission's Review Board No. 3 dismissed the complaint in a decision dated August 28, 1981 (App. C), concluding that it was premature. Nicholson took an ad-

ministrative appeal, and, by its decision of February 11, 1982 (App. B), the Commission affirmed Review Board No. 3's dismissal, but on different grounds. Finding that the complaint was not premature, the Commission then concluded that Missouri Pacific's proposed railroad classification yard was not a railroad line extension or addition within the meaning of section 10901. 366 I.C.C. at 74; App. at 21a. The Commission stated that it could find no instance where the construction of a railroad yard had been held to require Commission approval under section 10901(a) (or its predecessor, section 1(18) of the former Interstate Commerce Act), and that the reason "the issue arises so rarely" is that "in the few instances in which it has been raised, yard track has been found clearly exempt." 366 I.C.C. at 73; App. at 20a.

The court of appeals, in the decision herein sought to be reviewed (App. A),[2] affirmed the Commission "[b]ecause well-established judicial and Commission precedent compel the conclusion that the proposed . . . classification yard is not a 'railroad line' requiring Commission approval." 711 F.2d at 365; App. at 3a. It concluded that the determination of whether track segments are "railroad lines" subject to 49 U.S.C. § 10901(a) or, on the other hand, "spur, industrial, team, switching, or side tracks" exempt under 49 U.S.C. § 10907(b) turns on whether or not the track segments are required for a railroad's service between points of shipment and delivery (track segments not so required are exempt). 711 F.2d at 368; App. at 8a-9a. Under these principles, it found Missouri Pacific's proposed yard exempt from Commission regulation. Further, the court relied upon its statement that "the Commission has consistently interpreted the Act as not

[2] The court had jurisdiction pursuant to 28 U.S.C. §§ 2321, 2341 and 2342 (1976 and Supp. V 1981).

requiring its approval prior to the construction of yards." 711 F.2d at 368; App. at 10a.

The proposed railroad classification yard that was authorized without a Commission "public convenience and necessity" evaluation will be massive—approximately 3.5 miles long, one-half mile wide, and covering more than 550 acres of land. There will be over 100 miles of track in the yard, used to make up and break up freight trains, as well as to arrange and sort cars. The yard's construction cost is estimated to be $75 million. *See* 711 F.2d at 366; App. at 3a. Additionally, Missouri Pacific "clearly believes that the yard will allow it to provide more extensive and efficient service over its existing rail lines and may permit it to capture additional traffic." 366 I.C.C. at 74; App. at 21a.

REASONS FOR GRANTING THE WRIT

I. As A Result Of A Shallow Statutory Analysis And A Failure To Recognize This As A Case Of First Impression, The Court Of Appeals Has Permitted The Interstate Commerce Commission To Deregulate The Construction Of Railroad Classification Yards In A Manner Contrary To Legal Requirements And Adverse To An Orderly Reduction In That Agency's Jurisdiction

At the heart of the former Interstate Commerce Act ("Act"), and its current codification, is the requirement that a rail carrier subject to the Commission's jurisdiction obtain Commission approval before constructing a railroad line extension or addition. 49 U.S.C. § 10901(a). The Commission must evaluate the proposal and determine whether the present or future public convenience and necessity require or permit the construction. *Id.* This and related provisions establishing extensive Interstate Commerce Commission regulatory oversight were enacted to maintain the integrity of the national railroad

system, *i.e.*, to preserve the earnings capacity and financial resources of individual carriers, and to prevent the waste of resources on the building of unnecessary lines. *Texas & P. Ry.* v. *Gulf, C. & S.F. Ry.*, 270 U.S. 266, 277 (1926). *Accord, Railroad Comm'n* v. *Southern Pacific*, 264 U.S. 331, 341-42 (1924).[3] The Act, of course, contains certain exemptions from Commission regulation, including the exemption now codified in 49 U.S.C. § 10907(b)(1) (Commission jurisdiction does not extend to the construction of intrastate "spur, industrial, team, switching, or side tracks"). However, as this Court has stated, that and comparable exemptions "should be narrowed and limited to effect the remedy intended" by the underlying "remedial" legislation. *Piedmont & Northern Ry.* v. *ICC*, 286 U.S. 299, 311-12 (1932).

Petitioner submits that the court of appeals has failed to interpret § 10907(b)(1) narrowly and, thus, has allowed the Commission to circumvent § 10901(a)'s certification requirement. The implications of the decision, moreover, are far-reaching. What the Commission has done, with the court's concurrence, is to "deregulate" the construction of railroad classification yards—facilities at which railroads sort cars and put trains together to effectuate efficient through transportation movements. The court and Commission holdings technically may be limited to the proposed yard in question, but the underlying principle is sweeping. The import is that the Commission lacks jurisdiction over the construction of such yards, *regardless* of how extensive they are and how much they cost,

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[3] The Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980), which effected major revisions in the regulatory scheme in other respects, left undisturbed the fact of Commission oversight of railroad line construction. *See* H.R. Rep. No. 1430, 96th Cong., 2d Sess. 115-16 (1980).

and *regardless* of whether they facilitate major changes in the railroads' overall operations.

The resulting deregulation of railroad classification yards is especially troublesome since the Commission has at its disposal a broad statutory exemption vehicle by which it might effectuate the same change in a permissible fashion. 49 U.S.C. § 10505 (Supp. V 1981). Section 10505, however, requires the Commission to make certain findings before granting an exemption,[4] and the Commission has not made those findings here. Hence, the result of the Commission's action, sanctioned by the court, is at variance with the orderly administration of the underlying transportation statute.[5]

This situation arises because the court of appeals erred grievously in concluding that Missouri Pacific's proposed railroad classification yard is exempt under 49 U.S.C. § 10907(b) rather than a railroad line extension or addition within the meaning of 49 U.S.C. § 10901(a). The court's errors are several.

Although it is axiomatic that the starting point in any case concerning the interpretation of a statute is the language of the statute itself,[6] the court did not follow that approach. Rather than examine the wording of section 10901(a) to see whether the extensive trackage in

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[4] The Commission must find that the application of a provision is not necessary to carry out the transportation policy of 49 U.S.C. § 10101a and either (1) the transaction in question is of limited scope or (2) the application of the provision is not necessary to protect shippers from the abuse of market power. 49 U.S.C. § 10505.

[5] *Cf.* Office of Communication of United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983) (agency must adhere to statutory mandate in effecting deregulation).

[6] *E.g.*, Lewis v. United States, 445 U.S. 55, 60 (1980).

Missouri Pacific's proposed yard fairly may be characterized as an extension of or an additional "railroad line," and the wording of section 10907(b) to see whether the trackage fairly may be characterized as "spur, industrial, team, switching or side tracks," the court by-passed an examination of the provisions' plain meaning. *See* 711 F.2d at 366-67; App. at 6a-7a. Yet the statutory language supports petitioner's substantive position. The term "railroad" is defined to include a "yard." 49 U.S.C. § 10102(19)(C). This suggests—even if it does not demonstrate conclusively—that the term "railroad line," as it appears in 49 U.S.C. § 10901(a), includes a "yard."[7] In contrast, the section 10907(b)(1) exemption, covering certain "spur, industrial, team, switching or side tracks," does not include the term "yard," suggesting that ordinarily a railroad classification yard is not exempt from Commission jurisdiction.

Perhaps even more significantly, the court of appeals had absolutely no foundation to believe that judicial and Commission precedent "compel the conclusion" that Missouri Pacific's proposed yard is not a railroad line requiring Commission approval. 711 F.2d at 365; App. at 3a. The instant case—involving the question whether the Commission has jurisdiction over the construction of a massive classification yard that will be used for a substantial enhancement of through railroad movements—is one of first impression. Each of the few cases cited by the

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[7] The court of appeals has cited *Long Island R.R.* v. *New York Central R.R.*, 281 F.2d 379, 382-83 (2d Cir. 1960), concerning the distinction between the terms "railroad" and "railroad line." 711 F.2d at 369; App. at 10a. At most that case, dealing with off-track freight receiving stations, suggests that the definition of "railroad" does not establish the precise meaning of the term "railroad line"—not that the definition of "railroad" has no probative value.

court in which trackage was found to be exempt under § 10907(b) is distinguishable readily on its facts.[8] The court's additional conclusion that "the *Commission* has consistently interpreted the Act as not requiring its approval prior to the construction of yards" (711 F.2d at 368 (emphasis added); App. at 10a) is equally disturbing. Not only did the Commission itself note (correctly) that the issue had rarely been raised (366 I.C.C. at 73; App. at 20a), but the three cases cited by the court for the Commission's supposedly "consistent" application are completely inapposite.[9]

Further, the court of appeals wrongly suggested that trackage cost has no bearing on whether Commission approval is required prior to construction. 711 F.2d at

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[8] In the leading cases relied upon by the court, the trackage in question was found to be subject to the Commission's jurisdiction. *E.g., Texas & P. Ry.; New Orleans Terminal Co.* v. *Spencer*, 366 F.2d 160 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967); *Detroit & M. Ry.* v. *Boyne City, G. & A. R.R.*, 286 F. 540 (E.D. Mich. 1923). In *Georgia Southern & F. Ry.* v. *Duval Connecting R.R.*, 324 F.2d 801 (5th Cir. 1963) (per curiam), where a proposed railroad yard was found not subject to 49 U.S.C. § 10901(a), the court did not explain the basis for its conclusion and noted that the new facility, which may have had very different characteristics from Missouri Pacific's proposed classification yard, was a replacement for another yard within the same area. The few cases decided by the Interstate Commerce Commission on this subject are discussed in n. 9.

[9] *Oregon-Washington R.R. & Navigation Co. Construction*, 275 I.C.C. 591, 598 (1950), and *Boston Terminal Co. Reorganization*, 312 I.C.C. 373, 378 (1960), do no more than provide *dictum* that the construction of a new yard and the consolidation of terminal facilities are not *within themselves* subject to Commission jurisdiction. (In *Oregon-Washington*, where a yard was involved, its nature was not specified and it may not have been a classification yard at all.) In *Terminal Ry. Ala. State Docks—Operation, Mobile, Ala.*, 354 I.C.C. 747, 749 (1978), the Commission found that certain track to be

369; App. at 10a-11a. A basic purpose of the provision conferring Commission jurisdiction over railroad line construction was to create national regulatory oversight over major railroad expenditures. *Texas & P. Ry.*, 270 U.S. at 277; *Railroad Comm'n* v. *Southern Pacific*, 264 U.S. at 344-47. Moreover, where the exemption applies, "the expenditure involved is ordinarily small." *Texas & P. Ry. Co.*, 270 U.S. at 278.[10]

This Court should not allow the impermissible deregulation of railroad classification yards to stand. Construction of Missouri Pacific's proposed yard is subject to the Commission's jurisdiction under 49 U.S.C. § 10901(a), particularly since that provision was enacted to establish Commission review of major projects having a significant impact on the nature and extent of railroad operations.[11] *See, e.g., Texas & P. Ry.; Railroad Comm'n* v. *Southern Pacific; New Orleans Terminal Co.*

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used for *switching* purposes was exempt from regulation under the predecessor provision to 49 U.S.C. § 10907(b). Switching track, of course, is exempt by the very terms of section 10907(b). Missouri Pacific's proposed classification yard is distinguishable readily; it will involve far more than switching.

[10] *See also* Railroad Comm'n v. Southern Pacific, 264 U.S. at 344, 346 (expense of track construction discussed); Detroit & M. Ry., 286 F. at 547 (construction expenses one factor considered).

[11] The yard will be geographically large, containing 100 miles of track, and costly to construct. In addition, it will allow the carrier to provide more extensive and efficient service over its existing rail lines and may permit it to capture additional traffic. 366 I.C.C. at 74; App. at 21a.

II. In Holding That The Construction Of All Track Segments Not Physically Required For A Railroad's Service Between The Points Of Shipment And Delivery Is Exempt, The Court Of Appeals Erroneously Has Decided An Important Question Of Federal Law That Should Be Settled By This Court

The court of appeals has announced a new principle of federal law—that "track segments which are merely incidental to, *and not required for*, a railroad's service between points of shipment and delivery are exempted from the requirements of section 10901(a) by section 10907(b)." 711 F.2d at 368 (emphasis added); App. at 8a-9a. That principle departs from existing judicial standards, *i.e.*, the cases on which the court has relied do *not* establish a rule that track segments are exempt unless actually "required" for through transportation movements. Rather, those cases stand for the proposition that each situation should be examined to determine whether the nature and characteristics, *in toto*, permit application of the exemption. *See Texas & P. Ry.*, 270 U.S. at 278; *Detroit & M. Ry.*, 286 F. at 547; *New Orleans Terminal Co.*, 366 F.2d at 166. *See also Railroad Comm'n* v. *Southern Pacific*, 264 U.S. at 346-47. Although the use of track as part of a main line or for a through transportation movement may indicate that the section 10907(b) exemption is inapplicable, the absence of such main line trackage, or of the necessity of the trackage for a through movement, never has been said to establish conclusively that the trackage construction is exempt.

Thus, the facts that Missouri Pacific's proposed classification yard will not be part of the railroad's main line track, will not extend the railroad's service into any new territory, and will be used *in part* for switching (711 F.2d at 368; App. at 9a) cannot be determinative. Because the classification yard will be a massive and expensive

facility, at which trains will be broken up and reassembled in order to effectuate more extensive and efficient through rail service,[12] its construction constitutes the extension of a railroad line or the addition of a railroad line under 49 U.S.C. § 10901(a). The court of appeals' contrary holding represents a glaring misinterpretation of an important federal statute, requiring correction by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Date: September 28, 1983

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[12] *See* Railroad Comm'n v. Southern Pacific, 264 U.S. at 346 (track construction not exempt where there were "important changes in the handling of interstate traffic and passengers").

APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1428

JERRY K. NICHOLSON, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS

LOUISIANA SOYBEAN ASSOCIATION, MISSOURI PACIFIC RAILROAD COMPANY, INTERVENORS

Petition for Review of an Order of the Interstate Commerce Commission

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Argued January 10, 1983

Decided June 30, 1983

Fritz R. Kahn, for petitioner and intervenor, Louisiana Soybean Association.

Sidney L. Strickland, Jr., Attorney, Interstate Commerce Commission, with whom *John Broadley*, General Counsel, *Ellen D. Hanson*, Associate General Counsel, Interstate Commerce Commission, *John P. Powers, III*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

and *Kenneth P. Kolson*, Attorneys, U.S. Department of Justice, were on the brief, for respondents.

John P. Legendre, for intervenor, Missouri Pacific Railroad Company.

John J. Rademacher, was on the brief for American Farm Bureau Federation, Amicus Curiae, urging that the order under review herein be vacated.

Henry H. Bernard, Jr., was on the brief for Louisiana Farm Bureau Federation, Inc., Amicus Curiae, urging that the order under review herein be vacated.

James I. Collier, Jr., was on the brief for Association of American Railroads, Amicus Curiae, urging affirmance.

Before: ROBINSON, *Chief Judge*, WALD, *Circuit Judge*, and MACKINNON, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MACKINNON.

MACKINNON, *Senior Circuit Judge*: Petitioner, Jerry K. Nicholson, challenges an order of the Interstate Commerce Commission (Commission) which dismissed his complaint alleging that the Missouri Pacific Railroad Co. (Missouri Pacific) had violated the Interstate Commerce Act, 49 U.S.C. § 10901(a) (Supp. V 1981),[1] by attempt-

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[1] 49 U.S.C. § 10901(a) (Supp. V 1981) provides:

> A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission . . . may—
>
> (1) construct an extension to any of its railroad lines;
>
> (2) construct an additional railroad line;
>
> (3) acquire or operate an extended or additional railroad line; or
>
> (4) provide transportation over, or by means of, an extended or additional railroad line;
>
> only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

ing to build a railroad line—to wit, a classification yard adjacent to its main-line track in Pointe Coupee Parish, Louisiana—on his land without a finding by the Commission of public convenience and necessity. The Commission ruled that the classification yard was not a "railroad line" requiring the approval called for by section 10901 (a), but rather was a switching track excepted from Commission jurisdiction by 49 U.S.C. § 10907(b)(1) (Supp. V 1981).[2] *Nicholson v. Missouri Pacific R.R.*, 366 I.C.C. 69, 72-74 (1982). Because well-established judicial and Commission precedent compel the conclusion that the proposed Missouri Pacific classification yard is not a "railroad line" requiring Commission approval, we affirm the Commission's order.

I.

Petitioner owns farmland in Pointe Coupee Parish, Louisiana, on which he grows soybeans and other crops. Missouri Pacific presently owns a right-of-way over petitioner's land for the operation of a single-line track of railroad, but wishes to construct a classification yard adjacent to its track on petitioner's land. The numerous tracks in the yard will be used to switch cars in the making up and breaking up of freight trains, to arrange cars of trains in delivery order, and to sort cars in trains by types of cars or contents preparatory to train movement.[3] As a public utility, Missouri Pacific has filed

[2] 49 U.S.C. § 10907(b) (Supp. V 1981) (emphasis added) provides:

> The Commission does *not* have authority under sections 10901-10906 of this title over—
>
> (1) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, *switching*, or side tracks if the tracks are located, or intended to be located, entirely in one State . . . .

[3] The proposed classification yard will be approximately 3.5 miles long and 0.5 miles wide, will cover approximately 550 acres, and will consist of over 100 miles of track. The facility will cost Missouri Pacific approximately $75 million.

an action under state law in Louisiana state court to acquire by condemnation the necessary portion of petitioner's land. *Missouri Pacific R.R. v. Nicholson*, Civil Action No. 17299 (La. Dist. Ct. 1981).

Petitioner [4] filed a complaint with the Commission seeking a cease and desist order to prevent Missouri Pacific from taking any steps to construct the classification yard without Commission approval pursuant to section 10901 (a).[5] Petitioner contended that the classification yard would be "an additional railroad line" requiring the Commission's prior approval and that the Commission had not made the findings required by the statute. 49 U.S.C. § 10901(a) (Supp. V 1981). A Commission Review Board dismissed the complaint because it was not ripe for review. The Review Board reasoned that a "civil decision against [Missouri Pacific] may totally moot the issue of whether Commission approval of [Missouri Pacific's] construction is required." *Nicholson v. Missouri Pacific R.R.*, Finance Docket No. 29657, slip op. at 2 (Sept. 15, 1981). On appeal, the Commission affirmed the dismissal of petitioner's complaint, although on different grounds. *Nicholson v. Missouri Pacific R.R., supra*, 366 I.C.C. at 69.

The Commission found that the complaint was ripe for review because petitioner had demonstrated "a substantial probability that if the Commission waits, [petitioner] would be harmed by the challenged conduct before the Commission could determine its legality." *Id.* at 72. However, the Commission also found that the operations which would be performed at the classification yard would be *incidental* to main-line transportation and that such transportation would continue over Missouri Pacific's

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[4] Several other affected landowners joined in petitioner's complaint, but all have subsequently sold their land to Missouri Pacific and are not parties to this appeal. Brief for Intervenor, Missouri Pacific Railroad Co., at 3.

[5] *See* note 1 *supra*.

existing track. Noting that it had consistently held yards exempt from its jurisdiction under section 10907(b),[6] and had never authorized the construction of a classification yard, the Commission ruled that the proposed classification yard was not a railroad line requiring approval pursuant to section 10901(a). *Id.* at 72-74. This petition for review followed.

II.

Petitioner contends that the Commission erred in concluding that construction of the proposed classification yard did not require its approval.[7] Petitioner argues that

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[6] *See* note 2 *supra.*

[7] Petitioner also raises several frivolous procedural arguments in his petition for review. Petitioner asserts that the Commission erred in denying the requests of the Louisiana Soybean Association, the American Farm Bureau Federation, and the Louisiana Farm Bureau Federation to intervene in the Commission proceeding. However, the Commission properly concluded that these organizations sought

> intervention to present testimony *if the Commission holds a hearing* on whether destruction of agricultural land to build a classification yard is warranted. Because of our ultimate decision dismissing the complaint [for lack of jurisdiction over the proposed construction], no purpose would be served in permitting these parties to intervene.

Nicholson v. Missouri Pacific R.R., *supra*, 366 I.C.C. at 69 n.2 (emphasis added). We find, in any event, that the clarity of the legal principles mandating our affirmance of the Commission's order obviates remand for purposes of intervention by these parties.

Next petitioner contends that the Commission's decision was improper because only two Commissioners of the three Commissioner Division assigned to consider his complaint participated in that decision—one Commissioner would have participated only in the event of a tie. *See id.* at 74. The simple response to this argument is that the Interstate Commerce Act provides that the Commission may carry out its duties in Divisions consisting of three Commissioners, 49 U.S.C. §§ 10302(a), 10305 (Supp. V 1981), and that a majority of

because section 10102(19) of the Interstate Commerce Act defines "*railroad*" to include "yard,"[8] the Act's requirement that Commission authorization be received prior to construction of "*railroad* lines" necessarily encompasses construction of "yards." Petitioner also argues that because the proposed classification yard will cost $75 million, the substantiality of the cost requires the Com-

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a Division is a quorum for the transaction of business. *Id.* § 10306(a). Since a quorum of the assigned Division dismissed petitioner's complaint, its decision was valid. Northern Valley Transfer, Inc. v. ICC, 192 F. Supp. 600, 603 (D.N.J. 1961).

Finally, petitioner asserts that the decision was improper because the Commission was "politically imbalanced" at the time it was rendered; at that time the Commission consisted of three Republicans and one Democrat. However, petitioner concedes, as he must, that nothing in the Interstate Commerce Act requires a Division of the Commission to be politically balanced. Brief for Petitioner at 31. Thus petitioner can assert no injury as a result of the composition of the Commission since his complaint could have been assigned to a Division of the same Commissioners even if the Commission had consisted of a full contingent of eleven Commissioners, six from one party and five from the other. *See* 49 U.S.C. § 10301(b) (Supp. V 1981). Petitioner's real grievance with respect to the composition of the Commission lies with the President and the Senate, who failed to appoint and confirm additional Commissioners, and not with the validly appointed Commissioners who then composed the Commission. Assure Competitive Transp., Inc. v. United States, 629 F.2d 467, 474-75 (7th Cir. 1980), *cert. denied*, 449 U.S. 1124 (1981). The Act authorizes those Commissioners to exercise the powers of the Commission irrespective of vacancies in the membership of the Commission. 49 U.S.C. § 10301(e) (Supp. V 1981).

[8] 49 U.S.C. § 10102(19) (Supp. V 1981) (emphasis added) provides:

> "railroad" includes—
>
> . . . .
>
> (C) a switch, spur, track, terminal, terminal facility, and freight depot, *yard*, and ground, used or necessary for transportation.

mission to rule upon the project prior to its construction. We find these arguments to be without merit.

It is well established that the determination of whether a particular track segment is a "railroad line," requiring Commission authorization pursuant to section 10901(a), or a "spur, industrial, team, switching, or side" track, exempt from Commission jurisdiction pursuant to section 10907(b),[9] turns on the intended use of the track segment, not on the label or cost of the segment. It was held early on that

> it is sufficiently plain, from a consideration of not only the obvious purpose prompting the [Interstate Commerce Act[10]] but also of the general nature of the tracks mentioned, that Congress intended *to subject to the requirements of [section 1(18)]* so-called main or branch lines of railroad, that is, *lines designed and used for continuous transportation*

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[9] Congress first codified the provisions of the Interstate Commerce Act in 1978. Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337. Prior to that time the provisions of sections 10901 and 10907 were found at section 1(18) of the Act. Insofar as is relevant to this case, the codification made no substantive changes in these provisions. *See* Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 319 n.7 (1981).

[10] The court indicated that the purpose of Congress in enacting the Interstate Commerce Act was,

> as was pointed out by Interstate Commerce Commissioner Clark while speaking before the Committee on Interstate and Foreign Commerce of the House of Representatives, . . . "to prevent the building of duplicate lines of railroad because of keen rivalry of certain financial interests, or when the railroads so built will not serve the present or future convenience and necessity, and will simply depend for traffic upon that which they can get away from railroads already built, adding to the total burden of maintenance, capital returns, etc., which the public must pay."

Detroit & M. Ry. v. Boyne City, G. & A.R.R., 286 F. 540, 545 (E.D. Mich. 1923).

> *service by through, full trains between different points of shipment or travel, and to exclude* from the operation of the statute *all that mass of "tracks"* (as distinguished from "lines") naturally and necessarily *designed and used for* loading, unloading, *switching*, and other *purposes connected with, and incidental to*, but not actually and directly used for, *such transportation service.*

Detroit & M. Ry. v. Boyne City, G. & A.R.R., 286 F. 540, 546 (E.D. Mich. 1923) (emphasis added).[11] Shortly thereafter, the Supreme Court held that

> [i]*f the purpose and effect of the new trackage is to extend substantially the line of a carrier into new territory, the proposed trackage constitutes an extension of the railroad* within the meaning of [section 1(18) of the Act], although the line be short and although the character of the service contemplated be that commonly rendered . . . by means of spurs or industrial tracks.

Texas & P. Ry. v. Gulf, Colo. & S.F. Ry., 270 U.S. 266, 278 (1926) (emphasis added). Thus it can be seen that track segments which are intended to be used to carry through trains between points of shipment and delivery, particularly those segments which extend a railroad's service into new territory, must be approved by the Commission pursuant to section 10901(a). On the other hand, track segments which are merely incidental to, and not required for, a railroad's service between points of

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[11] *Accord* New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 165-66 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967) (emphasis added) ("If there are traffic movements which are part of the actual transportation haul from shipper to consignee, then the trackage over which the movement takes place is a 'line of railroad, or extension thereof . . . .' If, however, the trackage is used in the loading, reloading, storage and switching of cars *incidental* to the receipt of shipments by the carrier or their delivery to the consignee, then such trackage is 'spur, industrial, team, switching or side tracks' and as such, not under Commission jurisdiction").

shipment and delivery are exempted from the requirements of section 10901(a) by section 10907(b).[12]

Application of these principles to Missouri Pacific's proposed classification yard compels the conclusion that construction of the Pointe Coupee Classification Yard is not the construction of a "railroad line" requiring Commission approval pursuant to section 10901(a). The yard will be located adjacent to Missouri Pacific's existing main-line track in Pointe Coupee Parish and will be used solely for storage, *switching*, and classification of railroad cars. Although the classification yard is expected to increase Missouri Pacific's efficiency in handling freight traffic, the yard will not extend Missouri Pacific's service into any new territory. Through trains will continue to move over Missouri Pacific's existing main-line track to their prior destinations; the classification yard will be *incidental* to the operation of trains over that track. Accordingly, construction of the classification yard is exempted from Commission jurisdiction by section 10907(b).

Support for this conclusion is found in a decision of the Fifth Circuit which held, without explanation, that Commission approval pursuant to section 1(18) of the

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[12] That a track segment is or is not identified as a "spur, industrial, team, switching, or side" track is not determinative or whether it is exempted by section 10907(b) from Commission jurisdiction. *See, e.g.*, Texas & P. Ry. v. Gulf, Colo. & S.F. Ry., *supra*, 270 U.S. at 274-79 (track segment identified as "industrial" track held to require Commission approval pursuant to section 1(18)); New Orleans Terminal Co. v. Spencer, 366 F.2d 160, 165-66 (5th Cir. 1966), *cert. denied*, 386 U.S. 942 (1967) (track segment identified as "side" track held to require Commission approval pursuant to section 1(18)); Georgia S. & Fla. Ry. v. Du al Connecting R.R., 324 F.2d 801, 802 (5th Cir. 1963) (per curiam) (track segment identified as "yard" track held not to require Commission approval pursuant to section 1(18)).

Interstate Commerce Act [13] was not required prior to the construction of a classification yard. *Georgia S. & Fla. Ry. v. Duval Connecting R.R.*, 324 F.2d 801, 802 (5th Cir. 1963) (per curiam). Furthermore, the Commission has consistently interpreted the Act as not requiring its approval prior to the construction of yards:

> The applicant correctly states that the construction of a *new yard* and the consolidation of terminal facilities *are not within themselves subject to the jurisdiction of this Commission* and may be accomplished without its authority.

Oregon-Washington R.R. & Navigation Co. Construction, 275 I.C.C. 591, 598 (1950) (emphasis added). *Accord Terminal Ry. Ala. State Docks—Operation, Mobile, Ala.*, 354 I.C.C. 747, 749 (1978); *Boston Terminal Co. Reorganization*, 312 I.C.C. 373, 378 (1960).

Petitioner's arguments do not require a contrary result. The fact that the Interstate Commerce Act defines "railroad" to include "yard" does not support an interpretation that the phrase "railroad line" includes switching yards. There is a distinction in the statute between "railroad" and "railroad line." *See Long Island R.R. v. New York C.R.R.*, 281 F.2d 379, 382-83 (2d Cir. 1960).[14] Petitioner's reasoning simply ignores the significance of the term "line" in the phrase "railroad line," as well as sixty years of judicial and Commission interpretation of that phrase. Furthermore, nothing in the Act requires Commission authorization of railroad construction projects solely because such projects are costly.[15] It is the

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[13] *See* note 9 *supra*.

[14] *See also* note 12 *supra*.

[15] *Cf.* 49 U.S.C. § 11301 (Supp. V 1981) (Commission approval required prior to issuance of certain securities by railroads; Commission required to investigate intended use of proceeds from sale of such securities prior to approval).

purpose, and not the cost, of such projects which determines whether Commission approval is required.

Petitioner contends that his position is supported by several Supreme Court decisions, but we find this reliance to be misplaced. The opinion by Chief Justice Taft in *Railroad Commission v. Southern Pacific Co.*, 264 U.S. 320 (1924), comes the closest to discussing the point at issue, but it is distinguishable on its facts. In *Southern Pacific* the Court held that the Commission was required to give its approval before the City of Los Angeles could require three national railroads to replace their existing passenger stations with a single union station. *Id.* at 347. The plan for the new union station required the three railroads to make substantial *extensions* to their main-line tracks, which, while not great in distance, would "involve a new intramural destination for each railway with important changes in the handling of interstate traffic and passengers" and great expense to change the routes of "the *main tracks* in a crowded city." *Id.* at 346 (emphasis added). These substantial changes necessarily involved the abandonment by the three railroads of the main-line tracks that previously served their old depots and the *extension* of their main lines to the new terminal as ordered by the California State Railroad Commission at the request of the City of Los Angeles.

The project considered by the Court in *Southern Pacific* is clearly distinguishable from the Pointe Coupee Classification Yard because, as the Commission found, "the proposed [classification] yard is *not a line of railroad or an extension of a line* within the meaning of section 10901, since the operations to be performed at the yard are incidental to line-haul transportation." *Nicholson v. Missouri Pacific R.R.*, *supra*, 366 I.C.C. at 74 (emphasis added) (footnote omitted). This factual description of the classification yard leaves the Commission without jurisdiction over the proposed construction. *See* 49 U.S.C. §§ 10901(a), 10907(b)(1) (Supp. V 1981). The absence

of any change in, or *extension* of Missouri Pacific's main-line track, distinguishes its classification yard project from the union station project and associated new main lines that required Commission approval in *Southern Pacific.*[16]

III.

Missouri Pacific's proposed classification yard will be *incidental* to the operation of its existing main-line track

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[16] The other cases upon which petitioner relies are similarly inapposite and do not require a different result than we reach: L. Singer & Sons v. Union Pacific R.R., 311 U.S. 295, 303-04 (1940) (interest of merchant at market in Kansas City, Missouri was not sufficiently affected to give him right to enjoin construction of an extension of track by the Union Pacific Railroad to a new competing market in Kansas City, Kansas where such extension did not constitute a material change in the railroad's transportation system); Texas v. United States, 292 U.S. 522, 528-35 (1934) (Commission was empowered under the Emergency Railroad Transportation Act of 1933, in the interest of economy, to authorize lease of one interstate railway to another and to permit lessee to abandon or remove the general offices and shops of lessor even though such abandonment or removal was prohibited by the law of the state of lessor's incorporation in which such offices and shops were located); Piedmont & N. Ry. v. ICC, 286 U.S. 299, 303-05, 308-12 (1932) (electric line carrier that proposed to build two *extensions* of 53 and 73 miles respectively was not exempt from the requirement of obtaining a certificate of public convenience and necessity for such construction as a "street, suburban, or interurban electric railway" under section 1(22) of the Interstate Commerce Act where its track on city streets was only 2.9 miles—2.25 percent of its total track—and its business was pre-eminently interchange, interstate freight traffic of national character in all respects conducted the same as the business of steam freight carriers in the territory served); Texas & P. Ry. v. Gulf, Colo. & S.F. Ry., *supra*, 270 U.S. at 276-79 (*see* discussion at p. 8 *supra*; new 7.5 mile track intended to serve *new territory* currently being served by a competitor constitutes an *extension* of railroad within the meaning of the Transportation Act of 1920, and is not a spur or industrial track).

that runs through Pointe Coupee Parish, Louisiana. It does not involve any change in or extension of its main-line track and it qualifies as "switching" tracks that are specifically excluded by section 10907(b)(1) from the authority of the Commission under section 10901(a). Accordingly, the provisions of section 10901(a) do not require that Missouri Pacific obtain Commission authorization in order to construct said yard. The decision of the Commission so holding and dismissing petitioner's complaint against Missouri Pacific is therefore affirmed.

Judgment accordingly.

APPENDIX B

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 29657

JERRY K. NICHOLSON, NICK H. BRUCKERHOFF, OLIVER MAJOR AND HALLOWAY PLANTING CO. v. MISSOURI PACIFIC RAILROAD COMPANY

Decided February 11, 1982

The construction of a classification yard is exempt from Commission regulation pursuant to 49 U.S.C. 10907(b)(1). Complaint dismissed.

Fritz R. Kahn, John R. Long, and *Thomas E. Acey, Jr.,* for complainants.

William R. McDowell, R. H. Stahlheber, and *John P. Legendre* for defendants.

Louis D. Curet, John J. Rademacher, and *Larry LeJeune* for intervenors.

DECISION

By the Division:

In a decision served September 15, 1981, Review Board Number 3 dismissed as premature a complaint alleging that the Missouri Pacific Railroad Company (MoPac) had violated 49 U.S.C. 10901 by constructing a line of railroad without Commission approval. A joint appeal was filed by complainants[1] and petitions for leave to intervene were filed by

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[1] Jerry K. Nicholson, Nick H. Bruckerhoff, Oliver Major, and Halloway Planting Co.

several parties.[2] We are denying the joint appeal and affirming the previous decision on different grounds.

FACTS

Complainants are owners of certain tracts of land located near Livonia, in Pointe Coupee Parish, LA, over which MoPac owns a right-of-way for the operation of a single-line track of railroad. Complainants allege that MoPac seeks to expropriate portions of their property to construct a classification yard. The yard will be approximately 19,217 feet long and 2,000 feet wide, and will be located along one side of, and adjacent to, the main line of MoPac's Alexandria subdivision. It will be built on 555.625 acres in a rural, agricultural area.

To obtain the land needed for the classification facility, MoPac has filed an eminent domain civil action in Pointe Coupee Parish. Complainants urge that MoPac has never sought nor received a determination by this Commission under 49 U.S. 10901 authorizing the proposed construction. They argue that section 10901 expressly includes a yard as being embraced within the meaning of the term "railroad line" as used in section 10901,[3] and point to 49 U.S.C. 10102(19)(C)

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[2] The Louisiana Soybean Association, the American Farm Bureau Federation, and the Louisiana Farm Bureau Federation request intervention to present testimony if the Commission holds a hearing on whether destruction of agricultural land to build a classification yard is warranted. Because of our ultimate decision dismissing the complaint, no purpose would be served in permitting these parties to intervene. Accordingly, the requests are denied.

[3] Section 10901(a) reads, as follows:

A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

which defines a "railroad" as including "a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation." Their conclusion is that section 10901 expressly requires MoPac authorization from this Commission prior to the prosecution of an eminent domain proceeding.

The board dismissed the complaint on the grounds that it was premature. The board stated that an application is ripe for Commission review when there is either a binding agreement between the parties to a transaction for which Commission approval is necessary or when there is a situation where a party is ready and able to take an action requiring Commission approval. See *Magner-O'Hara Scenic Railway-Operation-In the State of Michigan* (not printed) decided May 6, 1981. The board found that before MoPac can begin to construct its proposed classification yard on complainants' land, it must first be victorious in the pending civil action. Because a civil decision against MoPac may moot the issue of whether Commission approval of the construction is required, the board concluded that the complaint was premature and dismissed it.

DISCUSSION AND CONCLUSIONS

Section 10901 provides that a rail carrier can "construct an extension to any of its railroad lines," or "construct an additional railroad line," only if the Commission certifies that the present or future public convenience and necessity require or permit the construction. MoPac has neither sought nor obtained Commission certification of its project. Accordingly, the only issues before us are (1) whether "construction" within the meaning of section 10901 has occurred; and (2) if so,

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(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or will be enhanced by the construction or acquisition (or both) and operation of the railroad line.

whether it involves construction of "an extension to" or an "additional railroad line."

Construction.—The board found that the bringing of a condemnation proceeding does not constitute "construction" within the meaning of section 10901. We cannot agree.

First, the board's finding would effectively deprive complainants of a forum in which to determine our jurisdiction over the proposed project. As demonstrated by complainants, Commission approval of a proposed construction must be obtained far enough in advance of a railroad's commitment so that the Commission will have time to review and evaluate the operational, financial, and environmental effects of the proposal. Here, MoPac has clearly stated its belief that no Commission approval is required and it is apparent that MoPac intends to commence construction as soon as the land is condemned. Accordingly, if we do not take jurisdiction now, construction would begin and complainants' property confiscated and damaged before we could determine whether the project was within our jurisdiction and if so, whether it should be approved. Failure to review the matter prior to the condemnation of complainants' land would be particularly unfair since complainants have no other forum in which to raise this issue. See 49 U.S.C. 11701(b). It is clearly appropriate to examine the merits of the complaint.

Second, the board's decision is contrary to the only decision directly on point. In *Tampa Phosphate R. Co.* v. *Seaboard Coast Line R. Co.*, 418 F.2d 387 (5th Cir. 1969), a railroad had begun condemnation proceedings in state court to obtain right of way for a proposed extension. No Commission approval had been obtained, so a competing railroad filed suit in Federal district court to enjoin the State court proceeding. The court enjoined proceedings to prevent violation of Federal law which would otherwise occur, finding that:

> [t]here appears to be no serious question that an attempt to condemn lands for the purposes of constructing new trackage thereon without first acquiring a certificate from

> the Interstate Commerce Commission constitutes "construction" within the meaning of this statute.

418 F.2d at 393. See also *Gilmore* v. *Sandersville R. Co.*, 149 F. Supp. 725 (M.D. Ga 1955); *Smyth* v. *Asphalt Bell Ry. Co.*, 12 F.2d 14 (5th Cir. 1926). We agree with the court in *Tampa Phosphate* that the condemnation of right-of-way to construct a railroad line is "construction" which triggers the approval requirements of 49 U.S.C. 10901.

The board cited *Magner-O'Hara Scenic Railway-Operation-In the State of Michigan*, served February 4, 1980, July 22, 1980, and May 12, 1981 (not printed) in support of its finding that the complaint should be dismissed as premature. There division 1 dismissed an application for authority to operate a passenger rail service because the service required trackage rights over another carrier which that carrier refused to grant and which, even if they could be obtained, would require additional Commission approval.[4] *Magner-O'Hara* is not determinative here for two reasons. First, under *Tampa Phosphate*, the condemnation proceeding itself is "construction" within the meaning of section 10901; this condemnation proceeding, if begun to construct a railroad line, is itself a violation of the section. Second, failure of the Commission to take action has a substantially different impact here than *Magner-O'Hara*. In that case, no operations could begin—and no party could be harmed—until successful negotiation of and approval of a trackage rights agreement. Here, complainants have shown a substantial probability that if the Commission waits, complainant would be harmed by the challenged conduct before the Commission could determine its legality.

In sum, the bringing of a condemnation proceeding constitutes "construction," and we will review the merits of the complaint.

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[4] A subsequent decision found the entire proposed operation to be outside our jurisdiction.

Railroad line.—The complaint alleges that MoPac is violating the act by constructing an addition to or extension of railroad line without prior Commission approval. MoPac's proposed classification yard is described in the record. The sole question before us, then, is whether construction of this yard might be considered the construction of a "railroad line."

The term "railroad line" is not defined in the act,[5] nor is the legislative history useful in resolving the issue. However, a separate section of the act excludes from the requirements of section 10901—again without further explanation—all "spur, industrial, team, switching and side track located, or intended to be located, entirely in one State." 49 U.S.C. 10907(b). Accordingly, we must look to case law and to common sense to determine whether a proposed classification yard could qualify as a rail line.

At the outset, we note that there are a large number of classification yards in this country, and many have been built since 1920 (when we obtained authority over the construction of railroad lines).[6] Yet complainants have cited, and we have found, no instance in which the Commission has found that the construction of a classification yard—or of any other yard—to require Commission approval under section 10901 or its predecessor, section 1(18) of the Interstate Commerce Act.

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[5] Complainants argued before the board that "railroad line" must include a classification yard because "railroad" is defined to include "a switch, spur, track, terminal facility, and a freight yard depot, yard, and ground used or necessary for transportation." 49 U.S.C. 10102(19)(C). This argument does not withstand scrutiny; it would imply, for example, that a carrier needs our approval before acquiring "ground" to be used to construct a communications facility. A railroad clearly requires some property that cannot be considered a "railroad line." We must look beyond the definition of "railroad" to define "railroad line."

[6] See, *e.g.*, the *Railway Age* article cited by complainants in their reply to defendant's motion to dismiss (p. 6).

We need not look far to explain why this issue arises so rarely: in the few instances in which it has been raised, yard track has been found clearly exempt. In *Georgia Southern and Florida Ry.* v. *Duval Connecting R.R.*, 324 F.2d 801 (5th Cir. 1963) the court held that construction of a classification yard similar to the yard proposed here was switching track which did not require Commission approval. Similarly, in *Terminal Ry. Ala State Docks—Operation, Mobile, AL*, 354 I.C.C. 747, 749 (1978), division 1 found exempt "certain rail yard properties," which were to be used as "a switching yard and to furnish connection terminal switching." Again, in *Florida E. C. Ry. Co. Petition for Declaratory Order*, 360 I.C.C. 272 (1979), the Commission observed that by contrast [to trackage which is a portion of a railroad line] trackage exempted under former section 1a(a) is characterized by its use "in the loading, reloading, storage, and switching of cars incidental to the receipt of shipments by the carrier or their delivery to the consignee." Cf. *Sioux City Term. Ry. Switching*, 241 I.C.C. 53, 90 (1940).

Complainants cite *New Orleans Terminal Co.* v. *Spencer*, 366 F.2d 160, 165-66 (5th Cir. 1966) as holding that trackage should be considered an addition or extension of railroad line if it is an essential part of a continuous through journey in interstate commerce and not merely incidental to a line-haul movement.[7] They urge that the proposed classification yard is to be used as part of the actual transportation haul from shipper to consignee, not merely as incidental to a line haul movement and they rely upon testimony submitted by MoPac indicating that its new yard would enable it to expand its markets and to serve additional shippers.

Complainants' reliance on *New Orleans Terminal Co.* is misplaced. The court there reviewed not yard trackage, but a

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[7] The court there said: "[I]f there are traffic movements which are part of the actual transportation haul from shipper to consignee then the trackage over which the movement takes place is a line of railroad, or any extension thereof." 366 F.2d at 165-66.

side track which was used for the passage of through trains. By contrast, the proposed classification yard is and can be used only for storage, switching, and classification. The transportation will continue to move over MoPac's existing main line. No shippers are located in the vicinity of the yard or will be directly served from the yard. No lines of any other carrier will reach the yard, so it cannot serve as a connecting track between two carriers. Compare *Duluth, S.S. & A.R. Co.* v. *Chicago, M., St. P. & P.R. Co.*, 307 I.C.C. 311 (1959). MoPac clearly believes that the yard will allow it to provide more extensive and efficient service over its existing rail lines and may permit it to capture additional traffic. However, we are convinced that the proposed yard is not a line of railroad or an extension of a line within the meaning of section 10901, since the operations to be performed at the yard are incidental to line-haul transportation.[5]

We conclude that complainants' appeal, except as discussed above, is without merit and should be denied. The board's dismissal of the complaint is affirmed on the ground that we have no jurisdiction over the proposed construction.

This decision will not significantly affect the quality of the human environment or the consumption of energy.

It is ordered.

1. The petitions for leave to intervene filed by the Louisiana Soybean Association, the American Farm Bureau

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[5] Complainants appear to argue that the Commission should have jurisdiction over the construction because it is a significant financial undertaking requiring from 40 to $60 million. Congress did not, however, give us jurisdiction over every railroad expenditure. Our jurisdiction over construction is limited to additions to or extensions of railroad lines, which generally occurs when a construction permits a carrier to penetrate a new market. See generally *Texas & P. Ry. Co.* v. *Gulf, C. & S.F. Ry. Co.*, 270 U.S. 266 (1926). *Chicago Great Western Ry Co.* v. *Illinois Central Gulf R. Co.*, 275 F. Supp. 909 (1967).

Federation, and the Louisiana Farm Bureau Federation are denied.

2. The complainants' administrative appeal, except as discussed in the decision, is denied.

3. The prior decision of Review Board No. 3 is affirmed.

4. This decision shall be effective when it is served.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Clapp, Gresham and Taylor. Commissioner Taylor is assigned to this division for the purpose of resolving tie votes. Since there was no tie in this matter, Commissioner Taylor did not participate.

AGATHA L. MERGENOVICH,
Secretary

(SEAL)

APPENDIX C

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 29657

JERRY K. NICHOLSON, NICK H. BRUCKERHOFF, OLIVER MAJOR AND HALLOWAY PLANTING CO. v. MISSOURI PACIFIC RAILROAD COMPANY

Decided August 28, 1981

On May 22, 1981, a complaint against the Missouri Pacific Railroad Company (MoPac) was filed by Jerry K. Nicholson. The complaint was brought under 49 U.S.C. § 11701 and the Commission's Rules, specifically 49 CFR 1100.26, and alleges a violation of 49 U.S.C. § 10901. On June 3, 1981, the complaint was supplemented to include three additional plaintiffs, Nick H. Bruckerhoff, Oliver Major, and Halloway Planting Co. On July 23, 1981, MoPac moved to dismiss plaintiff's complaint and supplemental complaint. Plaintiffs filed a reply.

Complainants allege that they are the owners of certain tracts of land located near Livonia in Pointe Coupee Parish, LA, over which MoPac, a rail carrier providing transportation subject to the jurisdiction of this Commission, owns a right-of-way for the operation of a single line track of railroad.

Complainants state that MoPac seeks to expropriate portions of their property to construct a new railroad yard facility and related facilities and appurtenances. To effect this acquisition MoPac has filed and is prosecuting a judicial action in the 18th Judicial District Court for the Parish of Pointe Coupee, State of Louisiana, Civil Action No. 17299, Division B, *Missouri Pacific Railroad Company* v. *Jerry K. Nicholson, Elizabeth Nicholson Fischer and James W. Smither III, as Trus-*

tees of the Leonard K. Nicholson Trust; El Tres Petroleum Corporation; and Nick H. Bruckeroff.

Complainants allege that MoPac has never sought nor received a necessary determination by this Commission under 49 U.S.C. § 10901 that the public convenience and necessity permit or require the proposed construction. Complainants accordingly request that MoPac be ordered to cease and desist from taking any further action to construct or to prepare for construction any additional rail lines over the property of complainants.

MoPac states that the proposed new railroad facility is a classification yard that will not serve any new shippers or extend the existing line of railroad into any new territory. MoPac urges that the Commission has never held that a classification yard is a railroad line or a line of railroad, or that Commission approval is required for the construction of a classification yard. MoPac accordingly urges dismissal of the complaint and supplemental complaint.

We believe that the complaint should be dismissed but for a different reason than that advanced by MoPac. An application is ripe for Commission review when there is either a binding agreement reached between the parties to a transaction for which Commission approval is necessary or when there is a situation where a party is *ready* and *able* to undertake an action for which Commission approval is required. *Magner-O'Hara Scenic Railway—Operation,—In the State of Michigan*, decisions served February 4, 1980, July 22, 1980, and May 12, 1981 (not printed).

Here, MoPac would like to construct its proposed classification yard on complainants' land but it first must be victorious in a pending and contested civil action. A trial has been set for January, 1982, and indeed a decision (especially if appealed) may be a long way off. A civil decision against MoPac may totally moot the issue of whether Commission approval of

MoPac's construction is required. Accordingly, we believe the complaint is premature.

It is ordered:

1. The complaint and supplemental complaint are dismissed.

2. This decision is effective on the date of service.

By the Commission, Review Board Number 3, Members Krock, Joyce, and Dowell.

AGATHA L. MERGENOVICH,
Secretary

(SEAL)

APPENDIX D

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 82-1428

JERRY K. NICHOLSON,

Petitioner,

v.

INTERSTATE COMMERCE COMMISSION
and UNITED STATES OF AMERICA,

Respondents.

LOUISIANA SOYBEAN ASSOCIATION,
MISSOURI PACIFIC RAILROAD COMPANY,

Intervenors,

Petition For Review Of An Order Of The Interstate Commerce Commission

Before: Robinson, Chief Judge, Wald, Circuit Judge, and MacKinnon, Senior Circuit Judge

JUDGMENT

This cause came on to be heard on a petition for review of an order of the Interstate Commerce Commission, and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED, by this Court, that the order of the Interstate Commerce Commissioin under review

herein is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 30 1983

GEORGE A. FISHER
CLERK

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: June 30, 1983.
Opinion for the Court filed by Senior Circuit Judge Mackinnon.